In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1773

EARL R. FOSTER, *Petitioner*

v.

DRAVO CORPORATION, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief for the Respondent

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BRIEF FOR THE RESPONDENT

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

(1) Whether a returning veteran, solely by reason of his military service, is entitled to accrue and automatically earn vacation pay benefits for the years spent in the military without having met the valid earnings requirements set forth in the collective bargaining agreement.

(2) Whether the issue of a returning veteran's right to pro rata vacation benefits may be determined by the Supreme Court although it was not raised or litigated at the trial level; and if so, whether a returning veteran is entitled to pro rata vacation benefits solely by reason of his military service in the absence of a contractual grant of pro rata benefits.

APPLICABLE COLLECTIVE BARGAINING AGREEMENT PROVISIONS NOT INCLUDED IN THE BRIEF FOR PETITIONER

The relevant provisions of the collective bargaining agreement not included by Petitioner are as follows:

Article V, "Discharge of Employees"

Section 1 provides:

> The right to discharge or discipline employees shall be the perogative of the Company, except that no discharge or disciplinary action shall be made without proper cause.

* * * * *

Article X, "Seniority"

Section 7 provides:

> Employees shall lose all seniority rights in all job classifications in which they have such seniority rights if:
>
> e. They are absent from work without explanation for a period of five (5) work days. Where there is good cause for such absence, the reason for the absence may be explained after the end of the five (5) days without loss of seniority.

* * * * *

Article XIV, "Vacations"

Section 3 provides:

> Where an eligible employee has worked a six (6) day week for not less than thirteen (13) nor more than twenty-five (25) weeks during said twelve (12) months, he shall be granted an additional four (4) hours with pay at his base hourly rate at the time he receives his vacation pay for each week of vacation to which he is otherwise entitled.
>
> Where an eligible employee has worked a six (6) day week for twenty-six (26) or more weeks during said twelve (12) months, he shall be granted an additional eight (8) hours with pay at his base hourly rate at the time he receives his vacation pay for each week of vacation to which he is otherwise entitled.

COUNTER-STATEMENT OF THE CASE

Petitioner Earl R. Foster was initially employed by Dravo Corporation on August 5, 1965, and worked for Dravo until he was inducted into the armed services of the United States on March 6, 1967. When Foster left Dravo, he was awarded all vacation benefits due him. Petitioner served in the military until October 1, 1968, and was restored to his previous position by Dravo on October 7, 1968. Upon his return to work, he was given credit for his military term in computing the length of his vacation benefits (App., p.64).

After his reinstatement, Foster requested that Dravo grant him vacation pay for 1967 and 1968, the years of his military service.[1] The applicable collective bargaining agreement provision provides that an employee, to be eligible for vacation benefits, "must have received earnings in at least twenty-five (25) workweeks in the twelve (12) months immediately preceding the current December 31st" (App., p.52). Since Foster had performed work for Dravo only nine weeks in 1967 and only thirteen weeks in 1968, Dravo denied Petitioner's request (Pet. App.A, p.2A). Dravo's refusal was predicated on the belief that because Foster had not received earnings in "at least twenty-five (25) workweeks," he was not entitled to vacation pay.

Petitioner thereupon instituted suit in the U.S. District Court for the Western District of Pennsylvania, alleging that

1 The record establishes conclusively that the vacation benefits in contention are for the years 1967 and 1968 (Pet. App.A, p.1A [Opinion of the Third Circuit Court of Appeals]; Pet. App.C, p.20A [Opinion of the District Court]; App., p.10 [Stipulation 10 of Stipulations of Fact filed in district court]). Petitioner, in its Brief to the Third Circuit presented the question as concerning vacation pay for 1967 and 1968. Petitioner here, possibly not fully understanding the nature of vacation benefits, mistakenly argues that the vacation benefits in question are for the years 1968 and 1969. (Brief for Petitioner at 6).

Dravo had violated Section 9 of the Military Selective Service Act, as amended, 50 U.S.C. App.§ 459, by denying him vacation benefits. The district court, in an Opinion and Order dated November 3, 1972 (Pet.. App.C, pp.20A-21A), held that Foster was not entitled to vacation pay in 1967 and 1968 because he failed to satisfy the requirement of having received earnings in at least twenty-five workweeks.

Following the decision of the district court, Petitioner appealed to the Court of Appeals for the Third Circuit. The Third Circuit perceived that matters of "seniority rights derive their scope and significance from Union contracts"[2] (Pet. App.A, p.14A). The court further recognized that vacation entitlement benefits must be realistically interpreted in the context of the collective bargaining agreement as a whole (Pet. App.A, p.12A), giving due regard to the every-day realities of labor-management relations (Pet. App.A, p.15A). The court did not find the contract obscure, as alleged by Petitioner, but simply stated that, "Although the language of the contract requiring the employee simply to receive earnings in at least twenty-five weeks is arguably ambiguous, it is not realistic to surmise that any employee could work for substantially less than the number of hours customarily regarded as constituting a full workweek for any period of time without being discharged" (Pet. App.A, p.14A). Moreover, the Court found that granting the Petitioner's request would "in effect, be granting to the returning veteran a windfall at the expense of his employer and be discriminating against employees who are required to meet the conditions of the collective bargaining agreement if they are to receive vacation benefits" (Pet. App.A, p.17A).

Having found that Foster was not entitled to full vacation pay for the years 1967 and 1968, the appeals court

2 *Aeronautical Lodge 727 v. Campbell*, 337 U.S. 521 (1949).

remanded the case to the district court for a determination as to whether the issue of pro rata vacation benefits was properly raised and litigated at the trial level and, if so, for a decision on the merits of his claim to pro rata benefits (Pet. App.A, p.18A).

SUMMARY OF ARGUMENT

I

When Congress first enacted the Military Selective Service Act, 50 U.S.C. App.451 *et seq.*, as amended, it sought to protect servicemen by guaranteeing that they would not be penalized on their return to civilian employment in the exercise of the various rights granted by collective bargaining agreements. Congress thereby provided that veterans are entitled to be credited with all seniority benefits for the period of their military service and, in addition, with all other benefits to which employees on furlough or leave of absence are entitled. Congress did not intend to discriminate in favor of returning veterans by granting them greater benefits than they would have received as a matter of right had they not entered the military.

The distinction between seniority and other benefits was analyzed by this Court in *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225 (1966). The Court determined that the categorization of contractual benefits into the two classifications must depend upon the real nature of the benefit in question and not upon the mere use of labels. When a benefit automatically accrues to an employee based upon his length of service with the employer, the benefit should be classified as a perquisite of seniority. When a benefit must be earned, however, and represents deferred compensation for work done, it is an other benefit and must be classified accordingly.

Courts and arbitrators concur that the real nature of vacation benefits which are based upon the fulfillment of an earnings requirement is deferred compensation. Thus vacation benefits are one of the other benefits within the meaning of the Act. A contrary conclusion would result in favored

treatment to the veteran at the expense of the non-veteran employee.

II

The collective bargaining agreement in the present case conditions entitlement to vacation benefits upon the fulfillment of an earnings requirement. Because the requirement is a valid one, the bizarre results possible in some contractual provisions which attempt to disguise the real nature of the benefit being granted, are not present in this case. Since Petitioner did not meet the prerequisites to earning a vacation, he is not entitled to vacation pay.

III

Petitioner asserts that at the very least he is statutorily entitled to pro rata vacation benefits. This issue is not properly before the Court as it has never been litigated, nor has it been determined whether it was properly raised below. Should this Court decide to consider the issue, however, Petitioner is not entitled, in the absence of a contractual grant, to pro rata benefits. Congress did not intend to create new rights for the veteran; it intended only to preserve those rights accorded by the collective bargaining agreement.

ARGUMENT

I VACATION BENEFITS WHICH ARE BASED ON EARNINGS REQUIREMENTS DO NOT AUTOMATICALLY ACCRUE WITH LENGTH OF SERVICE AND THUS ARE NOT PERQUISITES OF SENIORITY WITHIN THE MEANING OF THE MILITARY SELECTIVE SERVICE ACT.

A. Congress did not intend to discriminate in favor of the returning veteran.

In 1940, in an effort to prepare for the inevitable onslaught of World War II, Congress enacted the Selective Training and Service Act, 54 Stat. 885.[3] The primary purpose of the 1940 Act was to draft men for a year of precautionary training.[4] However, Congress also sought to ensure that the servicemen's absence in the military would not deprive them of reinstatement in their civilian jobs and thus Congress created reemployment rights for the returning veterans.[5]

The reemployment rights enacted by the 1940 Congress are presently embodied in the Military Selective Service Act of 1967 (hereinafter referred to as the Act), 50 U.S.C.App. §459(b) and (c)(1). Section 459(b) requires any employer to restore the veteran to the job which he held before he entered the military "or to a position of like seniority, status, and pay." Section 459(c)(1) of the Act provides that a veteran who is so restored:

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3 The reemployment rights provision of the 1940 Act was re-enacted in the Universal Military Training & Service Act of 1948, 50 U.S.C. App. §§451-73, as amended by the Military Selective Service Act of 1967, 50 U.S.C.App. §§451-67.

4 Haggard, *Veterans' Reemployment Rights and "The Escalator Principle,"* 51 Bost. U.S. Revl. 539, 539 (1971) (hereinafter referred to as *Haggard*).

5 *Haggard* at 539.

> ***Shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

It is thus evident that Congress desired to restore the veteran to his pre-military position of employment and to differentiate between seniority and other benefits. It was not, however, initially clear whether Congress intended the veteran's seniority to accumulate during his term of service or whether it intended to preserve for the veteran only such seniority as had accumulated prior to his entering the military.[6]

This conflict was soon resolved by the Court in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946), in which it was held that a veteran may be laid off in accordance with the seniority provisions of the applicable collective bargaining agreement during the veteran's first year of return to employment. This case has served as the foundation of all subsequent interpretations of the Act.

Although it held that a veteran is statutorily entitled to accumulate seniority during the tenure of his military service[7], the Court in *Fishgold* carefully pointed out that the

6 See remarks of Senators Danaher and Sheppard at 86 Cong.Rec. 10107 (1940); remarks of Congressman May at 86 Cong.Rec.10761 (1940); and *Haggard* at 542-543.

7 "Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position during the war." *Fishgold, supra*, 328 U.S. at 284-285.

seniority to which the veteran is entitled is only that which flows from the applicable collective bargaining agreement.[8] Thus, the returning veteran is entitled to no greater benefits than would have accrued to him had he not entered the military service.[9] The intent of Congress was to ensure that "he who was called to the colors was not to be penalized on his return***" (*Id.* at 284); in no way did Congress intend to discriminate in favor of the returning veteran.

The *Fishgold* decision was codified in 1948 when Congress enacted Section 459(c)(2) of the Act.[10] Congress did not intend to broaden the ambit of seniority benefits to which the returning veteran is entitled, nor did it attempt to alter the distinction between seniority and other benefits. Thus the intent of Congress remained unchanged. The veteran was not to be granted a "step-up or gain in priority" by virtue of his military service. *Fishgold, supra*, 328 U.S. at 286.

The Supreme Court affirmed its interpretation of the Act in two subsequent decisions incorrectly relied upon by Petitioner in this case. In *McKinney v. Missouri-Kansas-Texas*

8 "Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework of the seniority system***" *Id.* at 288. See also *Aeronautical Lodge 727 v. Campbell, supra*, 337 U.S. at 526.

9 "But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the Armed Services." *Fishgold, supra*, 328 U.S. at 285. See also *Id.* at 286 where the Court stated: "Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority mean no more."

10 S.Rep. No.1268, 80th Cong.,2d Sess.(1948).

R. Co., 357 U.S. 265 (1958), and in *Tilton v. Missouri Pacific R. Co.*, 376 U.S. 169 (1964), the Court dealt with a veteran's right to promotion. In both cases the Court held that a veteran is not automatically entitled to a promotion which is based upon managerial prerogative or satisfactory completion of a trainee requirement simply because he served in the military.[11]

In *McKinney*, *supra*, 376 U.S. at 271-272, Justice Frankfurter stated:

> However, § 9(c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. Much there is that might have flowed from experience, effort, or chance, to which he cannot lay claim under the statute. Section 9(c) does not assure him that the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service. The statute manifests no purpose to give the veteran a status that he could not have attained as of right, within the system of his employment, even if he had not been inducted into the Armed Forces but continued in his civilian employment.

Justice Goldberg, writing for the Court in *Tilton*, *supra*, 376 U.S. at 181 concurred with Justice Frankfurter:

[11] In *Tilton*, *supra*, the Court further determined that once the veteran satisfies the training requirement he is entitled to a seniority date reflecting the delay caused by military service. Since the seniority date is akin to the length of vacation benefits and not to vacation entitlement, this aspect of the Court's holding is irrelevant to the determination of the present case.

> This does not mean that under §§ 9(c)(1) and 9(c)(2) the veteran, upon returning from service, must be considered for promotion or seniority purposes as if he had continued to work on the job. A returning veteran cannot claim a promotion that depends solely upon satisfactory completion of a prerequisite period of employment training unless he first works that period.

Once again the Court made it clear that the returning veteran is not to be accorded privileged status. Furthermore, in *McKinney*, *supra*, the Court reaffirmed its earlier determination that a veteran's actual reemployment rights derive not from the Act but from the applicable collective bargaining agreement.[12]

Thus, Congress intended the Act to have important but limited effects. It did not intend to create new rights for the veteran but rather to guarantee that he would not be penalized in the exercise of rights granted by the collective bargaining agreement. Congress did not intend to place the veteran in a better position than those who did not serve in the military.

B. Perquisites of seniority to which veterans are statutorily entitled constitute only those benefits which automatically accrue with length of service; entitlement to other benefits is predicated upon the fulfillment of the valid prerequisites embodied in the collective bargaining agreement.

While the intent of Congress in creating the Act was thus clearly determined by this Court, the definition of seniority, and hence the distinction between seniority preroga-

[12] The Court stated: "Under Rule 1(3)(A) of the collective bargaining agreement (promotion) is dependent on fitness and ability and the exercise of a discriminating managerial choice. Collective bargaining agreements that include such familiar provisions are presupposed by the statute and it is in their context that it must be placed." *McKinney v. Missouri - Kansas - Texas R. Co.*, *supra*, 357 U.S. at 272.

tives and other benefits, still required clarification. The difference between the two is crucial: whereas a returning veteran is required by the Act to be credited with all perquisites of seniority, he is not entitled to receive other benefits unless the collective bargaining agreement or an existing practice clearly provides that employees on furlough or leave of absence receive such benefit. 50 U.S.C. App. § 459(c)(1)

The Supreme Court subsequently analyzed and defined the nature of seniority and those benefits derived from it in *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225 (1966). *Accardi* concerned veterans' demands that the employer include the time they spent in the military in computing the amount of severance pay due them. The Court granted the demands because the claimed benefit was, in practical and actual effect, a perquisite of seniority.

The most important aspect of *Accardi* is the Court's analysis of the concept of seniority. *Haggard* at 571. The Court affirmed that the term "derives its content from private employment practices and agreements," *Accardi v. Pennsylvania R. Co., supra*, 383 U.S. at 229. It further declared that Congress' intention in protecting the seniority rights of veterans "was to preserve for the returning veterans the rights and benefits which would have *automatically accrued* to them had they remained in private employment rather than responding to the call of their country." *Id.* at 229-30 (emphasis added). The critical issue, therefore, is the determination of those benefits which automatically accrue.

The categorization of the severance payments as benefits which automatically accrue was based on the Justices' determination of the integral nature of the benefit. The Court concluded that "the *real nature* of these payments was compensation for loss of jobs," the value of which was determined "by the rights and benefits (the employee) forfeits by giving up his job." *Id.* at 230 (emphasis added). Because "the

number and value of the rights and benefits increase in proportion to the amount of seniority***it is only natural that those with the most seniority should receive the highest allowances." *Ibid.* The Court, therefore, determined that "there can be no doubt that the amounts of severance payments were based primarily on employees' length of service with the railroad." *Ibid.* The "use of transparent labels and definitions" (*Id.* at 229), which produce "bizarre results" (*Id.* at 230), cannot disguise this fact.[13]

It is apparent from this Court's decision that seniority is to be defined as the employee's length of service with the employer.[14] Thus if a benefit automatically accrues with length of service, the veteran is entitled to credit his tenure in the military toward receipt of that benefit. However, if the benefit does not automatically accrue but rather represents compensation for work done, the benefit must be classified as an other benefit to which the veteran is not entitled unless the work is actually performed.

C. Vacation pay entitlement based on a valid earnings requirement is compensation for work done and thus is not a perquisite of seniority.

The Supreme Court had only one opportunity to analyze a veteran's request for vacation benefits for the years

13 The Petitioner asserts that the primary reason for the Court's determination in *Accardi* was that "(I)t was 'possible under the Agreement for an employee to receive credit for a whole year of "compensated service" by working a mere seven days,' " thus producing "bizarre results" (Brief for Petitioner at 16, 21). However, according to Archibald Cox in *The Supreme Court, 1965 Term*, 80 Harv.L.Rev. 91, 149 (1966), "This line of reasoning (asserted by Petitioner) is unconvincing" and, therefore, "did not constitute the principal basis of the Court's decision." Cox believes, as stated herein, that the Court based its decision on its finding that the "real nature" of severance pay is "compensation for length of service with the employer" *Ibid.*

14 See *Haggard* at 572.

spent in the military and that case is clearly distinguishable from the present matter.[15] In *Eagar v. Magma Copper Co.*, 389 U.S. 323 (1967) (per curiam), the collective bargaining agreement conditioned the receipt of vacation benefits upon the fulfillment of three requirements, only the last of which constitutes a valid earnings requirement: employment with the company for one year; employment on the last day of the vacation-earning year; and completion of at least 75 percent of the available shifts during the vacation-earning year. Eagar had worked 75 percent of the available shifts but was denied vacation pay because he had failed to meet the remaining requirements. Eagar, therefore, fulfilled the valid work requirements and earned his vacation.[16] Hence, "[t]here is no reason to believe that the Court viewed the 75 per cent-of-shifts-requirement as anything but a bona fide work requirement which must actually be satisfied."[17]

The real nature of vacation entitlement is compensation for work done. It is not based on length of service with the

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15 See *Kasmeier v. Chicago, Rock Island & Pacific R. Co.*, 437 F.2d 151 at 154-55 (10th Cir. 1971); *Austin v. Sears Roebuck & Co.*, 504 F.2d 1033 at 1037 (9th Cir. 1974); *Locaynia v. American Airlines*, 457 F.2d 1253 at 1260 (9th Cir. 1972) (dissenting opinion); and *Foster v. Dravo*, Pet. App.A, p.9A.

16 Petitioner asks the Court not to rely on this interpretation of *Eagar* since "the Court of Appeals opinion *** left some doubt about whether all the claimants had met the 75 percent requirement" (Brief for Petitioner at 19). Whether or not all the claimants actually met the requirements is irrelevant, however, since "[t]he Solicitor General and respondent agree that the facts in Eagar's case are representative of the other petitioners' cases, and this Court is asked to resolve the legal dispute on the basis of these facts." *Eagar v. Magma Copper Co., supra*, 389 U.S. at 323 n.1 (dissenting opinion).

17 *Haggard* at 575.

employer but must be earned in order to be granted. This view of vacation benefits is the one traditionally accepted by the courts. In *General Tire & Rubber Co. v. Local 512*, 191 F.Supp.911, 914 (D.R.I. 1961), *affd. per curiam*, 294 F.2d 957 (1st Cir. 1961), the district court, while holding that an employer was obligated to arbitrate the union's vacation pay claims, stated that, "Vacation pay is in the nature of deferred compensation in lieu of wages earned each week the employee works and payable at some later time." The Second Circuit also recognized that "[a] vacation with pay is, in effect, additional wages." *In re Wil-Low Cafeterias, Inc.*, 111 F.2d 429, 432 (2nd Cir. 1940).[18]

Moreover, as hereinbefore stated, resort must be made to the collective bargaining agreement to determine the nature of the benefit under review. This Court has uniformly recognized that labor arbitrators are especially adept at interpreting labor agreements.[19] Arbitrators concur with the courts that vacation entitlement based on the fulfillment of an earnings requirement is deferred compensation.[20]

This interpretation of the essence of vacation entitlement is crucial to a proper analysis of the vacation provision of a collective bargaining agreement. The manner in which a benefit has been traditionally construed indicates an "appreciation of the background understandings shared by the par-

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18 See also *In re Public Ledger, Inc.*, 161 F.2d 762 (3rd Cir. 1947); and *Goodell-Sanford, Inc. v. United Textile Workers*, 233 F.2d 104 (1st Cir. 1956).

19 See generally *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970).

20 M. Stone, Labor-Management Contracts at Work, 154 (1961) ("Paid vacations has often been referred to as a form of deferred earnings."). See also, *Bachmann Uxbridge Worsted Corp.*, 23 LA 596 at 602 (Hogan 1954); *Kroger Co.*, 37 LA 126 at 129 (Reid 1961); and *Blackford Glass Co.*, 11 AAA 20 (Sembower).

ties." *Foster v. Dravo*, Pet.App.A,p.15A. It thus enables the courts to pierce the "transparent labels and definitions" found in labor contracts, *Accardi, supra*, 383 U.S. at 229, and glean the provision's true intent. It was just such an understanding that enabled the Ninth Circuit to conclude:

> A paid vacation is fairly understood as part of a worker's short-term return for labor; hence, treating vacation time earned as a function of actual labor performed is not unreasonable. *Austin v. Sears Roebuck & Co., supra*, 504 F.2d at 1037.[21]

Vacation entitlement provisions of collective bargaining agreements which are based on valid earnings requirements are thus other benefits and not perquisites of seniority.

A contrary determination would discriminate in favor of the returning veteran, to the detriment of the non-veteran, a result clearly not intended by Congress. Were this Court to decide that a veteran is automatically entitled to receive vacation benefits by virtue of his military service, one group of employees (returning veterans) would be freed from meeting the contractual conditions upon which the benefits are predicated while all other employees would still have to meet them. As the court of appeals below reasoned, this would obviously result in a windfall to the veteran and a denial of equal treatment to employees on furlough or leave, who, because they failed to meet the earnings requirement, would not be receiving vacation pay (Pet. App.A, p.17A). The intent of Congress was to place veterans on a parity with employees on leave, not to grant them special privileges.

Moreover, a contrary determination would entitle the veteran to receive vacation benefits from both his employer

21 See also *Dougherty v. General Motors Corp.*, 176 F.2d 561 at 563 (3rd Cir. 1949), *cert. denied* 338 U.S. 956(A50); and *Dwyer v. Crosby Co.*, 167 F.2d 567 (2nd Cir. 1948).

and the Federal Government for the period of the veteran's military service. 10 U.S.C. § 701 provides that "A member of an armed force is entitled to leave at the rate of 2-1/2 calendar days for each month of active service." It would be far-fetched to imagine that Congress desired a serviceman to receive double vacation pay.[22]

Petitioner suggests that only provisions such as pooled or ratio-to-work vacation plans should qualify as other benefits within the meaning of the Act. This suggestion is unworkable as applied to the facts of the present case as well as to most collective bargaining situations. The plans proposed by the Petitioner are seldom found in labor contracts. They are geared solely to whose industries where workers tend to shift among employers and where there is a substantial amount of seasonal employment. A pooled plan does not require a direct correlation between the time worked and the vacation benefit; it merely implies that employers deposit the employees' vacation pay into a joint fund. The purpose of a ratio-to-work plan is primarily to prevent seasonal employees from receiving vacation benefits ("Paid Vacation and Holiday Provisions," Bulletin No. 1425-9, U.S. Department of Labor, Bureau of Labor Statistics, June 1969, pp. 4, 13).

It would seriously hamper free collective bargaining if this Court were to require the exactitude and rigidity that Petitioner seeks. In view of the fact that "Congress did not intend to take the employees' place at the bargaining table,"[23] it is doubtful that Congress intended to disregard meaningful qualifying provisions reached through collective bargaining.

22 Military Leave is the same as a paid vacation, *Austin v. Sears Roebuck & Co., supra*, 504 F.2d at 1037. It is not, as Petitioner implies, a readjustment benefit (Brief for Petitioner at 24).

23 *Dugger v. Missouri Pacific R. Co.*, 276 F.Supp. 496, 499 (S.D. Tex. (1967), *affd. per curiam*, 403 F.2d 719 (5th Cir. 1968).

II THE COLLECTIVE BARGAINING AGREEMENT IN THE PRESENT CASE INDICATES THAT VACATION ENTITLEMENT IS PREDICATED UPON THE FULFILLMENT OF A VALID EARNINGS REQUIREMENT AND THUS VACATION ENTITLEMENT IS AN OTHER BENEFIT TO WHICH PETITIONER IS NOT ENTITLED.

The collective bargaining agreement in this case requires an employee to "have received earnings in at least twenty-five (25) workweeks in the twelve (12) months immediately preceding the current December 31st" (App.,p.52) in order to be entitled to vacation benefits for that year. The court of appeals, after examining the contract, determined "that the terms of the collective bargaining agreement require twenty-five full workweeks, and Foster's failure to substantially comply in this case, precludes his claim to full vacation benefits" (Pet.App.A,p.17A). Petitioner apparently does not contest the Court's finding; rather, it merely asserts that *Accardi, supra*, 383 U.S. 225, prohibits an effective analysis of the contract. Petitioner has obviously misunderstood the *Accardi* decision.

As already noted, the lesson of *Accardi* is that the courts must analyze the substance, effect, and intent of the vacation entitlement provision in the context of the entire collective bargaining agreement. It is well established that courts possess the knowledge and authority to do so. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

In contrast, Petitioner would have this Court limit contractual analysis to a contorted, superficial, and rigid reading of the vacations provision alone. He would require the courts to regard a benefit as a perquisite of seniority so long as any interpretation, no matter how distorted and unrealistic,

would allow an employee to receive benefits without meeting the intended earnings prerequisites. Such a ruling would clearly obfuscate this Court's determination of the Act's nature and intent. As the court below so aptly stated:

> [I]t certainly would be ironic for the Supreme Court to direct lower courts to abandon the use of labels when deciding whether a benefit is a perquisite of seniority and at the same time direct that they replace such use with a strained and niggardly analysis of the terms of collective bargaining agreements. Pet.App.A, p.64.

Petitioner's additional concern that a thorough analysis of the contract is prejudicial to the veteran because he is unrepresented at the bargaining table also lacks merit.[24] Unions are under a duty to fairly represent all employees, including veterans. *Vaca v. Sipes*, 386 U.S. 171 (1967). Furthermore, it is commonly acknowledged that many collective bargaining agreements grant the veterans greater rights and privileges than those accorded him by the Act.[25]

Even a cursory reading of the collective bargaining agreement undeniably evidences that the "bizarre results possible" in *Accardi, supra*, 383 U.S. at 230, could not occur herein. The contractual prerequisite that an employee receive earnings in twenty-five workweeks before vacation benefits accrue is a substantial one; it requires twenty-five full weeks of work. Thus, if an employee were continually absent and worked only one hour per week for twenty-five weeks, as Petitioner hypothesizes (Brief for Petitioner at 21), he would not receive vacation pay.

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24 It should be noted that it was neither alleged nor is it indicated by the record that Petitioner in this case was unfairly represented in negotitations.

25 "Veterans Reemployment Rights Handbook", U.S. Department of Labor, Labor-Management Services Administration, 1970, p.85; Oswald & Smyth, *The Veteran Returns to the Job*, 76 Am. Fed. 19 at 21,23 (Oct. 1969).

An employee who worked substantially less than the number of hours customarily regarded as constituting a full workweek for any period of time would clearly be discharged under the terms of the collective bargaining agreement. Article VI, Section I of the agreement in issue makes it clear that an employee can be discharged for proper cause (App.,p.29). The record in the district court establishes that frequent failure to report for work constitutes proper cause for discharge (App.,pp.66,67).

Furthermore, the collective bargaining agreement reveals a strong concern on the part of Respondent that all employees report to work regularly. Article X, Section 7(e) (App.,p.46) provides the stern punishment of loss of seniority when an employee is absent for five days without excuse. Thus the employer does not tolerate frequent absenteeism.

A crucial test in the determination that a benefit represents compensation for work performed is whether the contract grants overtime credit. *Palmarozzo v. Coca-Cola Bottling Co.*, 490 F.2d 586 at 591 n.4 (2nd Cir. 1973). Article IV, Section 3 of the collective bargaining agreement in the present case (App.,p.52) satisfies that test by providing:

> Where an eligible employee has worked a six (6)-day week for not less than thirteen (13) nor more than twenty-five (25) weeks during said twelve (12) months, he shall be granted an additional four (4) hours with pay at his base hourly rate at the time he receives his vacation pay for each week of vacation to which he is otherwise entitled.
>
> Where an eligible employee has worked a six (6)-day week for twenty-six (26) or more weeks during said twelve (12) months, he shall be granted an additional eight (8) hours with pay at his base hourly rate at the time he receives his vacation pay for each week of vacation to which he is otherwise entitled.

Not only does an employee gain additional vacation benefits as a result of working overtime, but the benefits increase in proportion to the amount of overtime worked. Hence the vacation benefits provided by Respondent are directly related to the work performed by the employee.

One must therefore conclude that the vacation pay provided by Respondent is deferred compensation and that, to be eligible to receive vacation pay, an employee is substantially required to perform labor for twenty-five workweeks. Petitioner, however, was in the military for approximately nine months of each of the years in question and was not working for the Employer. To allow Petitioner to nevertheless accrue vacation benefits would thus be inconsistent with the concept and nature of an earned vacation.

Hence, Section 459(c) of the Act may not be construed as obligating the Respondent to confer vacation benefits upon the Petitioner unless the collective bargaining agreement grants those benefits to employees on non-military leave. The record is clear that the collective bargaining agreement makes no such grant. Petitioner is not entitled to receive vacation pay for the years 1967 and 1968.

III PETITIONER IS NOT ENTITLED TO A PRO RATA SHARE OF HIS VACATION BENEFITS FOR 1967 AND 1968, NOR IS THE ISSUE OF PETITIONER'S RIGHT TO PRO RATA BENEFITS PROPERLY BEFORE THIS COURT

Petitioner argues that if it is herein determined that the right to vacation benefits does not constitute a perquisite of seniority, Petitioner is nevertheless statutorily entitled to a pro rata share of his vacation benefits for the years 1967 and 1968. However, the issue of Petitioner's right to pro rata benefits is not properly before this Court.

The Complaint in this case (App., p.3) contains no averment relating to pro rata benefits nor was the question of pro rata relief litigated at the trial level. In fact, the record in the district court establishes that the issue was specifically excluded from determination (App., p. 10). The only reference to pro rata benefits in the district court was in the form of a settlement offer proffered by the district court judge. In view of these circumstances the court of appeals remanded the case to the district court for a determination of whether the question of pro rata relief was properly raised below and, if so, to decide the question on the merits. Thus the issue of Petitioner's right to pro rata benefits has never been litigated, nor is it clear whether it was ever properly raised.

This Court has long recognized that unless there are exceptional circumstances, it may consider only those questions which were definitively raised and litigated below. *Blair v. Oesterlein Co.*, 275 U.S. 220 (1932); *McGrath v. Manufacturer's Trust Co.*, 338 U.S. 241 (1949). As there are clearly no exceptional circumstances in this case, Respondent respectfully submits that the Court must decline the question of pro rata eligibility.

However, assuming *arguendo* that this Court determines to consider the issue, Respondent asserts that Petitioner is not statutorily entitled to pro rata relief. As already noted, Congress did not intend in passing the Act to create new rights and benefits for the returning veteran. It intended instead to preserve those benefits accorded by the collective bargaining agreement. *Fishgold v. Sullivan Drydock & Repair Corp., supra*, 328 U.S. at 288. Accordingly, there is no statutory right to any benefit which is not found in the contract. Petitioner is thus decidedly in error when he argues that the right to pro rata benefits is granted by the Act alone.

Petitioner's agrument in support of pro rata benefits lacks logic. He acknowledges, for purposes of his argument,

that vacation entitlement is not a perquisite of seniority. Based on this assumption, the seniority provisions of the Act are inapplicable and the veteran is entitled to pro rata benefits only if they are one of the "other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence." 50 U.S.C. App. §459(c)(1). Petitioner, however, asserts that the Court must ignore the other benefits language of the Act. Thus, there is obviously no basis upon which this Court can grant the Petitioner's requested alternate relief. A returning veteran is not statutorily entitled to pro rata vacation benefits.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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